

YAP HONG CHOON

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v.

DR PRITAM SINGH

HIGH COURT MALAYA, KUALA LUMPUR

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TEE AH SING J

[CIVIL SUIT NO: S5-22-595-2003]

13 DECEMBER 2005

**CIVIL PROCEDURE:** *Pre-trial case management - Directions and orders - Expert reports - Disclosure - Whether rules of court can provide for pre-trial disclosure of expert evidence intended to be produced at trial*

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**CIVIL PROCEDURE:** *Pre-trial case management - Directions and orders - Expert reports - Disclosure - Order 25 r. 8(5)(b) Rules of the High Court 1980 - Whether provision for disclosure before trial of expert evidence applies to medical negligence cases*

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**CIVIL PROCEDURE:** *Rules of procedure - Practice direction - Conflict with procedural rules of court - Whether Practice Direction No. 1 of 2001 directing suspension of application of Order 25 Rules of the High Court 1980 valid*

E

**EVIDENCE:** *Privilege - Legal professional privilege - Whether rules of court can take away privilege to withhold experts' reports*

**EVIDENCE:** *Expert evidence - Expert reports - Privilege - Section 126 Evidence Act 1950 - Whether expert medical opinion privileged from disclosure*

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The defendant applied *vide* summons in chambers (encl. 17) under O. 34 r. 4 of the Rules of the High Court 1980 ("RHC") and/or the inherent jurisdiction of the court for a direction or order, that the parties to the action herein furnish a written report in respect of each and every expert whose evidence was intended to be adduced and relied upon at the trial of this action by filing a copy thereof in court, and serving a copy thereof on every other party to the action herein within such time or period as the court deemed fit.

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The affidavit in support of the application affirmed by the defendant, a consultant Eye Specialist, stated that the disclosure of expert evidence intended to be given orally at trial in the form of a written report would greatly assist in facilitating a just and

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- A expeditious resolution of the trial of the action. The defendant further averred that if there was an exchange of expert evidence before the trial of the action, neither party would be prejudiced. The plaintiff's affidavit in reply stated that in law expert opinions are privileged from disclosure. The plaintiff claimed that a litigant
- B can issue a subpoena to compel a witness to attend court to give evidence or to produce documents but a litigant cannot compel a witness albeit a witness of fact or an expert witness to prepare a written report and to disclose it to the litigant. The plaintiff further averred that the defendant by making this application was fishing
- C for the plaintiff's and plaintiff's witnesses' evidence and privileged information in advance of the trial. This was said to cause prejudice to the plaintiff.

**Held (dismissing encl. 17 with costs in the cause):**

- D (1) The Evidence Act 1950 ('EA') and the Courts of Judicature Act 1964 ('CJA') have no provisions to allow rules of court to be made to take away the privilege to withhold experts' reports and to provide for pre-trial disclosure of expert evidence intended to be produced at the trial. (para 19)
- E (2) It is specifically provided under O. 25 r. 8(5)(b) of the RHC that the provision for disclosure before trial of expert evidence does not apply to medical negligence cases. (para 22)
- F (3) The learned Chief Judge of Malaya has issued a Practice Direction No. 1 of 2001 directing the suspension of the application of O. 25 of the RHC pursuant to O. 92 r. 3B of the RHC. Order 92 r. 3B of the RHC does not empower the Chief Judge of Malaya to suspend O. 25 of the RHC. Instead
- G it is a general provision for practice directions to be issued for the better carrying out or giving effect to the provision of the rules. The RHC and in particular O. 25 of the RHC is subsidiary legislation made by the Rules Committee pursuant to s. 17(1) of the CJA. So under s. 22 of the Interpretation
- H Acts of 1948 and 1967 ('IA'), the RHC including O. 25 may be added to, revoked, suspended or revived by the Rules Committee only. Based on the authority of *Megat Najmuddin bin Dato Seri (Dr.) Megat Khas v. Bank Bumiputra (M) Bhd*, the Practice Direction No 1 of 2001 issued by the learned
- I Chief Judge of Malaya to suspend O. 25 of the RHC is *ultra vires* and invalid. (paras 23, 25, 27, 29 & 32)

- (4) Under O. 34 r. 4(2)(f) of the RHC, the judge may order either party to the action to furnish the report of an expert and fix the time for delivery of such report. However O. 34 r. 4(2)(f) of the RHC is subsidiary legislation made by the Rules Committee. Neither the EA nor the CJA provides that rules of court may be made to take away the privilege of non-disclosure for experts' reports to be disclosed before trial. Order 34 r. 4(2)(f) of the RHC (which is a subsidiary legislation) is inconsistent with s. 126(1) of the EA (which is an Act); therefore under s. 23(1) of the IA, O. 34 r. 4(2)(f) of the RHC is void. (paras 39, 40 & 42)

- (5) Under s. 126 of the EA, experts' reports are privileged from disclosure. The expert medical opinion in respect of the plaintiff is privileged from disclosure under s. 126(1). (para 5)

**Case(s) referred to:**

- Kirkup v. British Rail Engineering Ltd* [1983] 1 All ER 855 (*refd*)  
*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd*  
 [2002] 1 CLJ 645 FC (*refd*)  
*Naylor v. Preston Area Health Authority* [1987] 2 All ER 353 (*refd*)  
*Ollett v. Bristol Aerojet Ltd* [1979] 3 All ER 544 (*refd*)  
*Wilsher v. Essex Area Health Authority* [1986] 3 All ER 801 (*refd*)

**Legislation referred to:**

- Courts of Judicature Act 1964, s. 17(1)  
 Evidence Act 1950, s. 126(1)  
 Interpretation Acts 1948 and 1967, ss. 22, 23(1)  
 Rules of the High Court 1980, O. 25 r. 8(1)(a), (b), (c), (4), (5),  
 O. 34 r. 4(1), (2), O. 92 r. 3B  
 Civil Evidence Act 1968 [UK], s. 2  
 Civil Evidence Act 1972 [UK], s. 2  
 Courts and Legal Services Act 1990 [UK], s. 5  
 Evidence Act 1872 [India], s. 126(1)

**Other source(s) referred to:**

- Practice Direction No. 1 of 2001  
*Sarkar's Law of Evidence*, 1999, vol. 2 15th edn  
 For the defendant/applicant - *Raja Eileen Soraya (Sharlini Jeyaratnam with him); M/s Raja, Darryl & Loh*  
 For the plaintiff/respondent - *MS Dhillon; M/s PS Ranjan & Co*  
 Reported by *Amutha Suppayah*

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## JUDGMENT

**Tee Ah Sing J:**

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[1] This is an application *vide* summons in chambers (encl. 17) by the defendant under O. 34 r. 4 of the Rules of the High Court 1980 (“the RHC”) and/or the inherent jurisdiction of the court for a direction or order that:

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(1) the parties to the action herein do furnish a written report in respect of each and every expert whose evidence is intended to be adduced and relied upon at the trial of this action by

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- (a) filing a copy thereof in court; and
  - (b) serving a copy thereof on every other party to the action herein,
- within such time or period as this Honourable Court may deem fit;

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- (2) the costs of and occasioned by this application be costs in the cause; and
- (3) such further or other order as the Honourable Court may deem fit.

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[2] The application is supported by the affidavit affirmed by the defendant on 30 September 2004 (encl. 16). The facts gathered from encl. 16 are as follows:

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- 1. The defendant is a consultant Eye Specialist.
- 2. The disclosure of expert evidence intended to be given orally at trial in the form of a written report would greatly assist in facilitating a just and expeditious resolution of the trial of the action.

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- 3. There are no reasons as to why the court should not direct or order such disclosure by the parties of their respective experts’ evidence intended to be relied upon at trial.
- 4. If there is an exchange of expert evidence before the trial of the action, neither party would be prejudiced.

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[3] An affidavit in reply was affirmed by the plaintiff on 7 October 2004 (encl. 18) to oppose the application. The facts as gathered from encl. 18 are as follows:

1. In law expert opinions are privileged from disclosure. A
2. A litigant can issue a subpoena to compel a witness to attend court to give evidence or to produce documents. However a litigant cannot compel a witness albeit a witness of fact or an expert witness to prepare a written report and to disclose it to the litigant. B
3. The defendant has not mentioned any expert report when he filed his list of documents dated 3 October 2003. This must be because the defendant and his solicitors are well aware that such expert reports are prepared for the purposes of the litigation and are therefore privileged from disclosure. C
4. In the event that the defendant and his solicitors believe that expert reports are not privileged documents but instead are discoverable documents, then the defendant should have made full discovery of such documents in his list of documents. D
5. There are sufficient provisions in the rules and in law which entitles the defendant to claim privilege so as to prevent disclosure of experts' reports. E
6. The defendant by making this application is fishing for the plaintiff's and plaintiff's witnesses' evidence and privileged information in advance of the trial. This will cause prejudice to the plaintiff. F
- [4] The learned counsel for the defendant has put in a written submission dated 4 March 2005.
- [5] The learned counsel for the plaintiff has put in an outline submission in reply dated 11 March 2005. G
- [6] The learned counsel for the defendant has put in a written reply dated 28 March 2005.
- [7] The learned counsel for the plaintiff has put in plaintiff's further submission dated 30 March 2005. H
- [8] I have considered all the written submissions filed.
- [9] I now consider the application before me.
- [10] Section 5 of the English Courts And Legal Services Act 1990 reads as follows: I

**A            Witness statements**

5. (1) Rules of court may make provision:

- B**            (a) requiring, in specified circumstances, any party to civil proceedings to serve on the other parties a written statement of the oral evidence which he intends to adduce on any issue of fact to be decided at the trial;
- C**            (b) enabling the court to direct any party to civil proceedings to serve such a statement on the other party; and
- C**            (c) prohibiting a party who fails to comply with such a requirement or direction from adducing oral evidence on the issue of fact to which it relates.

**D**            (2) Where a party to proceedings has refused to comply with such a requirement or direction, the fact that his refusal was on the ground that the required statement would have been a document which was privileged from disclosure shall not affect any prohibition imposed by virtue of subsection (1)(c).

**E**            (3) This section is not to be read as prejudicing in any way any other power to make rules of court.

**[11]** Section 2 of the English Civil Evidence Act 1968 provides as follows:

**F**            Admissibility of out-of-court statements as evidence of facts stated

**G**            2. (1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

**H**            (2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement:

**I**            (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf

of that party before the conclusion of the examination-in-chief of the person by whom it was made, except:

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(i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or

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(ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.

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(3) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.

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Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings (whether civil or criminal) it may be proved in any manner authorised by the court.

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[12] Section 2 of the English Civil Evidence Act 1972 reads as follows:

**Rules of court with respect to expert reports and oral expert evidence**

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2. (1) If and so far as rules of court so provide, subsection (2) of section 2 of the Civil Evidence Act 1968 (which imposes restrictions on the giving of a statement in evidence by virtue of that section on behalf of a party who has called or intends to call as a witness the maker of the statement) shall not apply to statements (whether of fact or opinion) contained in expert reports.

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(2) In so far as they relate to statements (whether of fact or opinion) contained in expert reports, rules of court made in pursuance of subsection (1) of section 8 of the Civil Evidence Act 1968 as to the procedure to be followed and the other conditions to be fulfilled before a statement can be given in evidence in civil proceedings by virtue of section 2 of that Act (admissibility of out-of-court statements) shall not be subject to the requirements of subsection (2) of the said section 8 (which specifies certain matters of procedure for which provision must

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A ordinarily be made by rules of court made in pursuance of the said subsection (1).

(3) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court:

(a) for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties or some of them shall each by such date as may be so specified (or such later date as may be permitted or agreed in accordance with the rules) disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial; and

(b) for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of paragraph (a) above from adducing in evidence by virtue of section 2 of the Civil Evidence Act 1968 (admissibility of out-of-court statements) except with the leave of the court, any statement (whether of fact or opinion) contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction.

(4) Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings.

(5) Without prejudice to the generality of subsection (4) above, rules of court made in pursuance of that subsection may make provision for prohibiting a party who fails to comply with a direction given as mentioned in subsection (3)(b) above from adducing, except with the leave of the court, any oral expert evidence whatsoever with respect to matters of any class specified in the direction.

[13] Thus in England, the English Civil Evidence Act 1968, the English Civil Evidence Act 1972 and the English Courts and Legal Services Act 1990 are enabling Acts of Parliament allowing for rules of court to be made for pre-trial disclosure of experts' reports but only if they were intended to be called at the trial.

[14] The English Supreme Court Practice 1997 Vol 1 deals with the Rules of the Supreme Court 1965. A

[15] The English Rules of the Supreme Court 1965 were amended pursuant to the English Civil Evidence Act 1968, the English Civil Evidence Act 1972 and the English Courts and Legal Services Act 1990. B

[16] Under the English Rules of the Supreme Court 1965 as amended, the court has power to order disclosure before trial of reports of experts who are intended to be called at trial. C

[17] If privilege is intended to be withdrawn at trial, reports must be disclosed earlier.

[18] However, the right to privilege remains, which means that the parties may withhold experts' reports, but then such experts may not give oral evidence at trial without leave. D

[19] However our Evidence Act 1950 and the Courts of Judicature Act 1964 have no provisions to allow rules of court to be made to take away the privilege to withhold experts' reports and to provide for pre-trial disclosure of expert evidence intended to be produced at the trial. E

[20] The cases of *inter alia*, *Naylor v. Preston Area Health Authority* [1987] 2 All ER 353, *Ollett v. Bristol Aerojet Ltd* [1979] 3 All ER 544, *Kirkup v. British Rail Engineering Ltd* [1983] 1 All ER 855 and *Wilsher v. Essex Area Health Authority* [1986] 3 All ER 801 cited by the learned counsel for the defendant can be distinguished on the grounds that the English Supreme Court Rules 1965 were amended to allow pre-trial discovery of expert evidence. F G

[21] Order 25 r. 8(1)(a), (b) and (c), (4) and (5) of the RHC reads as follows:

**8. Automatic direction in personal injury action (O. 25 r. 8)** H

(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically:

(a) there shall be discovery of documents within 14 days in accordance with Order 24 rule 2, and inspection within seven days thereafter, save that where liability is admitted, or where the action arises out of a road I

- A accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;
- (b) subject to paragraph (2), where any party intends to place reliance at the trial on expert evidence, he shall, within 10 weeks, disclose the substance of that evidence
- B to the other parties in the form of a written report, which shall be agreed if possible;
- (c) unless such reports are agreed, the parties shall be at liberty to call as expert witnesses those witnesses the substance of whose evidence has been disclosed in accordance with the preceding subparagraph, except that the number of expert witnesses shall be limited in any case to two medical experts and one expert of any other kind;
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- D ...
- (4) For the purposes of this rule:
- “a road accident” means an accident on land due to a collision or apprehended collision involving a vehicle; and
- E “documents relating to special damages” include:
- (a) documents relating to any industrial injury, industrial disablement or sickness benefit rights, and
- (b) where the claim is made under the Civil Law Act, documents relating to any claim for dependency on the deceased.
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- (5) This rule applies to any action for personal injuries except:
- (a) any Admiralty action; and
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- (b) any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment.
- H [22] So it is specifically provided under O. 25 r. 8(5)(b) of the RHC that the provision for disclosure before trial of expert evidence does not apply to medical negligence cases.
- [23] The learned Chief Judge of Malaya has issued a Practice Direction No. 1 of 2001 directing the suspension of the application of O. 25 of the RHC pursuant to O. 92 r. 3B of the RHC.
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[24] Order 92 rule 3B of the RHC reads as follows:

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**3B. Practice directions (O. 92 r. 3B)**

The Chief Judge after consulting the Chief Justice may issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of these rules, and those of the Subordinate Courts Rules 1980.

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[25] I am of the view that O. 92 r. 3B of the RHC does not empower the Chief Judge of Malaya to suspend O. 25 of the RHC. Instead it is a general provision for practice directions to be issued “for the better carrying out or giving effect to the provision of these rules ...”

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[26] Section 17(1) of the Courts of Judicature Act 1964 reads as follows:

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**17. Making of rules of court.**

(1) Rules of court under section 16 may be made by a Rules Committee appointed as hereinafter provided.

[27] It is clear that the RHC and in particular O. 25 of the RHC is subsidiary legislation made by the Rules Committee pursuant to s. 17(1) of the Courts of Judicature Act 1964.

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[28] Section 22 of the Interpretation Acts of 1948 and 1967 reads as follows:

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Subsidiary legislation may at any time be amended, varied, added to, revoked, suspended or revived by the person or authority by which it was made or, if that person or authority has been lawfully replaced by another person or authority, by that other person or authority.

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[29] So under this s. 22 of the Interpretation Acts of 1948 and 1967 the RHC including O. 25 may be added to, revoked, suspended or revived by the Rules Committee only.

[30] In the case of *Megat Najmuddin bin Dato Seri (Dr.) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 CLJ 645 (“*Megat Najmuddin’s case*”) His Lordship Steve Shim CJ (Sabah and Sarawak):

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It is true that the Chief Justice has been empowered under r. 110 of the RFC to issue practice directions. So has the President of the Court of Appeal under r. 77 of the RCA. Nevertheless, it cannot have been in the contemplation of Parliament that they can

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- A issue practice directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such practice directions are in conflict, in the sense of superceding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once
- B practice directions have been properly and legally issued, they must be complied with. I believe that to be trite (see *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54; *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakian* [1999] 2 MLJ 677).
- C [31] In *Megat Najmuddin's* case His Lordship Mohtar Abdullah FCJ said:
- D As the then Supreme Court noted in *Ooi Bee Tat*, practice directions are directions for administrative purposes and have no statutory authority. They are framed to provide administrative guidelines for the proper implementation of the procedural rules. They help to clarify or highlight existing rules for proper
- E compliance of the said rules as set out in the relevant court rules or the relevant Act of Parliament. The problem is that this particular Court of Appeal Practice Direction No 1 of 1995 goes beyond its administrative purview as it provides for substantial deviations from the strict procedural rules set out in r 18 of the RCA. The fault lies with the framers and issuer of the practice direction. A rule of court cannot be amended by an administrative
- F direction. Rule 18 of the RCA should have been modified and amended accordingly to accommodate the two alternative procedures sought to be introduced by the said practice direction. Perhaps, the Chief Justice and/or the Rules Committee might wish to review the various practice directions affecting the High Court, Court of Appeal and Federal Court and, where such directions have the effect of changing or modifying procedural rules set out
- G in the relevant court rules, then the relevant court rules should be amended or modified accordingly. It is clear that practice directions, with no statutory authority, cannot supercede the relevant court rules or the relevant Act of Parliament. But where, as in the present case, the existence of the practice direction and its reliance or compliance by a litigant leads to the litigant being punished for
- H his reliance or compliance of the selfsame direction by the court, then surely there is a case for any judge or court to exercise judicial discretion to prevent injustice.
- I [32] Based on the authority of *Megat Najmuddin's* case the Practice Direction No 1 of 2001 issued by the learned Chief Judge of Malaya to suspend O. 25 of the RHC is *ultra vires* and invalid.

[33] Order 34 r. 4(1), (2)(d), (2)(e), (2)(f), and (2)(j) of the RHC reads as follows: A

**4 First pre-trial conference (O. 34 r. 4)**

- (1) Where the parties to an action appear in person or by an advocate on the return date appearing in Form 63 (hereinafter referred to as “the first pre-trial conference”), then the Judge to whom the action has been assigned shall, after conferring with them, make such orders and give such directions as to the future conduct of the action to ensure its just, expeditious and economical disposal. B C
- (2) Without prejudice to the generality of the provision of paragraph (1), the Judge may:
- (a) ...
- (d) order the parties or any of them to deliver their respective lists of documents that may be used at the trial of the action; D
- (e) direct the parties to the action to furnish to the Judge and to exchange between themselves, a bundle containing each of their respective documents; E
- (f) order either party to the action to furnish the report of an expert and fix the time for the delivery of such report; F
- ...
- (j) subject to all just exceptions as to privilege, direct the parties to make any disclosure or provide any information which the Judge considers relevant to the issues in the action; G

[34] Section 126 of the Indian Evidence Act 1872 reads as follows:

S. 126. Professional communications. – No (barrister, attorney, pleader or vakil) shall at any, time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such [barrister, pleader, attorney or vakil] by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for purpose of such employment: H I

A Provided that nothing in this section shall protect from disclosure:

(1) Any such communication made in furtherance of any (illegal) purpose;

B (2) Any fact observed by any (barrister, pleader, attorney or vakil), in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

C It is immaterial whether the attention of such (barrister, (pleader,) attorney or vakil) was or was not directed to such fact by or on behalf of his client.

[35] Section 126 of the Evidence Act 1950 reads as follows:

126. Professional communications.

D (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment;

Provided that nothing in this section shall protect from disclosure:

F (a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

G (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[36] So it is clear that s. 126(1) of our Evidence Act 1950 is in *pari materia* with s. 126(1) of the Indian Evidence Act 1872.

H [37] *Sarkar's Law of Evidence*, vol. 2 15th edn 1999 on the commentary on s. 126 of the Indian Evidence Act 1872 at p. 2051 reads as follows:

I Oral or documentary information from third persons, which has been called into existence by the solicitor, (or by his direction, even though obtained by the client for the purposes of litigation, eg, information to be embodied in proofs of witnesses; reports

made by medical men at the request of the solicitors of a railway company, as to the condition of a person threatening to sue the company for injury from a collision (*Woolley v. N L Ry*, LR 4 CP 602; *Friend v. L C & D Ry*, 2 Ex D 437); reports by servant of company made for use of the company's solicitor and in reasonable apprehension of a claim against the company (*Collins v. London G O Co*, 68 LT 831) are privileged (*Phip* 11th edn, p 258).

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[38] So under s. 126 of our Evidence Act 1950 experts' reports are privileged from disclosure.

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[39] Under O. 34 r. 4(2)(f) of the RHC the judge may order either party to the action to furnish the report of an expert and fix the time for delivery of such report.

[40] However this O. 34 r. 4(2)(f) of the RHC is subsidiary legislation made by the Rules Committee. Neither the Evidence Act 1950 nor the Courts of Judicature Act 1964 provides that rules of court may be made to take away the privilege of non disclosure for experts' reports to be disclosed before trial.

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[41] Section 23(1) of the Interpretation Acts 1948 and 1967 reads as follows:

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- (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

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[42] An O. 34 r. 4(2)(f) of the RHC (which is a subsidiary legislation) is inconsistent with s. 126(1) of the Evidence Act 1950 (which is An Act) therefore under s. 23(1) of the Interpretation Acts 1948 and 1967 O. 34 r. 4(2)(f) of the RHC is void.

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[43] As the expert medical opinion in respect of the plaintiff is privileged from disclosure under s. 126(1) of the Evidence Act 1950, I dismissed encl. 17 with costs in the cause.

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